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IN THE

Supreme Court of the United States

October Term, 1958

No. 481

MARIE TORRE,

Petitioner,

against

JUDY GARLAND,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 17, 1958.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

We respectfully submit that the petition for a writ of certiorari should be denied.

Petitioner asserts that a constitutional question is involved. We submit that all that is involved is the effort of a newspaper reporter to claim a privilege against testifying when she has no such privilege.

We urge that the petition should be denied for the following reasons:

1. In the State of New York, where this case arose and where the libel occurred, a newspaper reporter is not privileged. See *People ex rel. Mooney* v. *Sheriff of New York County*, 269 N. Y. 291 (1936). The interest of newspapers in this case, to which petitioner has referred at length in her petition, arises from their natural desire to create a new privilege for their own benefit. They have

not concerned themselves with the greater interest of the courts and litigants in obtaining material facts through witnesses having knowledge thereof in lawsuits between private litigants. The alleged public interest, to which petitioner has referred is not real but was created by the newspapers in their own self-interest.

2. A witness might just as well assert that the constitutional right of freedom of speech relieves him of repeating on the witness stand what he stated outside of court.

3. Petitioner Torre is not a reporter. She is a writer of a "gossip" column and the press is in no danger because the writer of a "gossip" column is required to state the name of the person who made libelous statements to her, which she in turn repeated. As appears from one of her columns (9)* she repeated libelous statements concerning respondent which were made to her by a "CBS" (Columbia Broadcasting System) executive (9), quoting the very words which had been told to her. The nature of her column (9-10)—pure gossip—appears (a) from the remark that the popular notion that everybody loves Judy Garland "requires a bit of revision" (9), (b) "Anyway, Webb (a TV performer) makes it clear he's none too happy about 'folding my tent like an Arab' " (10) and (c) "Pinky Lee • • • is bubbling over with TV ideas" (10). It is at least doubtful that those who adopted the First Amendment had such comments in mind.

4. Since petitioner stated that the statements were made to her by a CBS executive, she had already disclosed the source of her information and all that she has been required to do by the order of the District Court, as af-

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* References, for example (3) are to pages of the Joint Appendix. References, for example (5a) are to Appendix A of the Petition and (6b) to Appendix B of the Petition.

firmed by the Court of Appeals, is to state the name of that executive who, concededly, did not make the statements to her in confidence (32).

5. Freedom of the press is not in any event involved. Respondent has never sought to interfere and the order compelling the petitioner to disclose the name of the CBS executive does not interfere with the gathering or publication of news. Torre was free and is still free to obtain statements, gossip or otherwise, from whomsoever she pleases and to repeat them in her column.

6. Freedom of the press, moreover, does not extend to everybody connected with a newspaper. For example, it does not, in our opinion, protect a linotypist or an engineer in the employ of a newspaper from testifying to a matter in litigation. A "gossip" columnist is similarly not protected.

The Opinion of the Court of Appeals

The opinion of Judge (now Mr. Justice Stewart) concurred in unanimously, appears as Appendix A to the petition.

In his opinion, Mr. Justice Stewart dealt as follows with the "Three alternative arguments * * * advanced in support of the appellant's (petitioner's) position" (3a):

> 1. He accepted without deciding, the hypothesis that applying the law of the land to journalists in like manner as to all other people, might make the gathering of news more difficult (4a) but stated that even assuming such hypothesis this present case "does not seem difficult" (4a).

Mr. Justice Stewart then stated (4a-5a) that:

> What must be determined is whether the interest to be served by compelling the testimony of the witness in the *present case* justifies some impairment

of this First Amendment freedom" (4a—italics ours).

And with respect thereto he stated that

"Freedom of the press * * * is not an absolute" (4a). "Freedom of the press * * * is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press" (4a-5a). Further, "that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States." (5a) It is "'[O]ne of the duties which the citizen owes to his government * * * to support the administration of justice by * * * giving his testimony whenever he is properly summoned'", (5a-6a) citing *Blackmer* v. *United States*, 284 U. S. 421, 438.

Mr. Justice Stewart then pointed out (6a):

"Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. But '(t)he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.' *Blair* v. *United States* [250 U. S. 273 (1919)], *supra*, 281."

Thus, as Mr. Justice Stewart indicated, every time a person is called to the witness stand and required to testify to what he stated off the stand, it could be argued that his right of freedom of speech is impinged upon. He concluded that "*If* an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair

administration of justice." (6a—italics ours). Citing *Bridges* v. *California*, 314 U. S. 252 (1941); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Craig* v. *Harvey*, 331 U. S. 367 (1947), (footnote 6a), the Court stated: "These decisions all recognized that when the exercise of freedom of the press directly impedes the proper functioning of the judicial process, it must yield." In this case, said Mr. Justice Stewart, there was no effort to force a "wholesale disclosure of a newspaper's confidential sources of news" (6a). "*The question asked of the appellant went to the heart of the plaintiff's claim*" (7a—italics ours).

2. Petitioner is not protected by an evidentiary privilege. (7a). New York grants no privilege (7a). If that question is to be determined by law other than that of New York, Mr. Justice Stewart stated "we find no reason to depart from the precedents, federal and state, refusing to recognize such a privilege in the absence of a statute creating one" (7a) (citing cases). "[T]he tendency should be 'not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege'" (7a).

3. Mr. Justice Stewart held that there "was no abuse of * * * discretion in this case" in ordering petitioner to state the name of her CBS informant (8a). He pointed out that the District Judge found that the deposition was being taken "'in good faith'", in a proper manner and was "'a necessary step in the due and proper preparation for trial'" and that those "findings were entirely justified" (8a).

Statement

Respondent Garland instituted an action against Columbia Broadcasting System, Inc. in the United States District Court for the Southern District of New York on two causes of action, including a cause of action for the libel (6-8) which appeared in the column referred to. Petitioner quoted

statements made by a CBS "network executive" that respondent who is a professional actress, singer and "star of the first magnitude" and "a performer of the highest standing" (6) "doesn't want to work", had an "inferiority complex", "won't make up her mind about anything", is "terribly fat") (9, 10) and otherwise seriously reflecting upon and affecting the reliability of respondent as a professional performer in the theatrical and TV world. The column appeared in the New York Herald Tribune, which has a circulation of 367,248 (27) and was syndicated in newspapers throughout the country (28).

Depositions of a number of executives of Columbia Broadcasting System were taken but all of them denied making statements to Torre and denied knowledge as to who had made them (19), (93, 94). Interrogatories dated November 20, 1957 were then addressed to Columbia Broadcasting System which denied knowledge as to who made the statements to Torre—as appears from the following:

> "Interrogatory Number 1: Did any person or persons in the employ of the defendant Columbia Broadcasting System, Inc. make any statement, either orally or in writing, to one Marie Torre concerning the plaintiff Judy Garland between the first day of January, 1957 and the 11th day of January, 1957?
>
> "Interrogatory Number 2: Did any person or persons in the employ of the defendant Columbia Broadcasting System, Inc. speak to one Marie Torre of or concerning the plaintiff Judy Garland or have any conversation with one Marie Torre in which the name of the plaintiff Judy Garland was mentioned, between the first day of January, 1957 and the 11th day of January, 1957?"

The attorneys for Columbia Broadcasting System, Inc. by notice dated December 3, 1957, answered said two interrogatories as follows:

> "Interrogatory Number 1: Not so far as defendant has been able to ascertain.

"Interrogatory Number 2: Not so far as defendant has been able to ascertain."

The aforementioned interrogatories and answers thereto were certified as part of the record now on file in this Court (see pp. 220-221 and 257-258 of said record).

Thus, indisputably respondent was not able to obtain the name of the Columbia Broadcasting System executive from Columbia Broadcasting System officials. She was not obliged as suggested in the petition (21) to go to the absurd length and expense of taking the deposition of every employee of the entire Columbia Broadcasting System.

The deposition of petitioner was taken and appears in full in the Joint Appendix (24-39). She testified that the quotations in her column were the "exact words" of the "network executive" (31). She was asked for the name of the network executive and she refused to give it (32). *She was then asked "Q. Did this network executive ask you to withhold giving his name?" And she answered "A. No, he did not* * * *" (32). (Italics ours.)

It was thereafter that the proceeding was instituted to punish her for contempt.

The motion to punish petitioner for contempt was met by a cross-motion by her under Rule 30 (42) for an order directing that the name of the network executive should "not be inquired into" on the ground that that "would unreasonably annoy, embarrass and oppress" her (42)—a contention seemingly based on the notion that a newspaper employee is not under the same duty as any other witness to give material testimony. Mr. Justice Stewart stated that the question asked of petitioner "went to the heart of the plaintiff's claim" (7a). The District Judge found (116)—and the Court of Appeals concurred (8a)—that petitioner's deposition was being taken in good faith, in a reasonable manner, was a necessary step in the proper preparation for trial and that "we have no assurance, even

if the examination were delayed, that the position taken by the witness would in any way be changed" (116). He held that the examination was "not unreasonable or oppressive in scope" and denied the cross-motion (116). The disposition of that motion was a discretionary matter with the District Court and the Court of Appeals held there was no abuse of discretion.

POINT I

Petitioner, claiming protection under the First Amendment, in reality asserts a privilege where none exists.

Petitioner refers (p. 15, *et seq.* of her petition) to the English cases on the question of privilege. She has cited no decision by a state or federal court. In each of those English cases, the newspaper was the defendant and the name of the person who informed the newspaper was, in any event, immaterial. In the instant case the New York Herald Tribune is not a defendant and it is basic to respondent's libel action that she ascertain the name of the CBS executive who made the statement in order to show that such person was in a position of authority to bind CBS.

In New York State, a reporter is not privileged and as Mr. Justice Stewart stated, the federal courts have also ruled that a newspaper reporter is not privileged.

In *People ex rel. Mooney v. Sheriff of New York County*, 269 N. Y. 291 (1936). the New York Court of Appeals expressly held that a reporter on the New York American was not privileged from disclosing the source of his information. The Court of Appeals stated the following at page 293:

> "The only question presented on this appeal is whether a newspaper reporter may lawfully refuse to answer pertinent questions relating to communica-

tions made to him as a reporter on the ground that such communications are privileged."

The Court of Appeals then stated the following, quoting from Wigmore on Evidence at page 294:

> "5 Wigmore on Evidence (p. 1) contains a discussion on the subject of privileged communications. Section 2286 reads: '* * * Accordingly, *a confidential communication* to a clerk, to a trustee, to a commercial agency, to a banker, *to a journalist*, or to any other person, not holding one of the specific relations hereafter considered, *is not privileged from disclosure.*'" (Italics ours.)

And further at page 295 the Court of Appeals stated:

> "*The policy of the law is to require the disclosure of all information by witnesses in order that justice may prevail.* The granting of a privilege from such disclosure constitutes an exception to that general rule. In the administration of justice, the existence of the privilege from disclosure as it now exists often, in particular cases, works a hardship. *The tendency is not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.*" (Italics ours.)

Petitioner has quoted (page 9 of the petition) from a statement by Professor Chafee but Professor Chafee clearly referred to "confidential sources of information" and stated that it is desirable to respect a reporter's claim of "confidence except in cases of great necessity where he clearly possesses knowledge which is otherwise unobtainable." In this case, petitioner admitted that the statements were not made to her in confidence and respondent has not been able to obtain the essential information from any other witness.

On at least nine different occasions, bills introduced in the New York State Legislature for the purpose of giving reporters a privilege against disclosure were not passed. See New York Law Revision Commission, *Report* (1949) Appendix B, pp. 101-125.

As stated in the petition (page 8 thereof), twelve states have enacted laws granting a privilege to newspaper reporters.

The obvious remedy of petitioner lies with the legislature.

The absence of any decision by a state or federal court in support of petitioner's contention and the enactment of laws granting a privilege in some states is clear indication that since the Constitution was adopted, it is fundamental in our law that a newspaper reporter is no different from any other witness. Declaration of a constitutional privilege at this time would overthrow the considered decisions of every court which has passed upon this question and change a principle which is basic to the administration of justice.

POINT II

Petitioner has already disclosed the source of her information by stating in her column that it was a CBS "network executive". All that she is required to do is to give the name of the network executive.

Petitioner identified her source as a "network executive" of the CBS system. In her column she did not content herself with making statements concerning respondent as matters of her own knowledge nor did she state that she had obtained the information from a "reliable source." *She was not content with anonymity,* but obviously wanted to lend prestige and give weight and credence to her quotations by attributing them to a "network executive" in the employ of one of the two largest TV networks in this country. Thus she disclosed the source of her information. Suppose that petitioner had written in her column that her source of information was "one of

the Vice Presidents of the XYZ Bank of New York City" or was "a member of the Federal Communications Commission;" can it be doubted that she has thus stated the source of her information? Additionally, she admitted that "this net work executive" had not asked her "to withhold giving his name" (32).

The position taken by petitioner comes to this—she should be free to repeat libelous statements for widespread publication and yet to be able to protect the real libeller from being identified by name. If her position is sound, then a slanderer may accomplish his purpose by using a newspaper reporter to repeat his statements, without fear of detection or liability.

POINT III.

Compelling petitioner to state the name of the executive is not an impairment of the First Amendment and even if there were some impairment, the public interest in compelling testimony of the witness is paramount.

Petitioner was free to gather news and print news as she saw fit. Compelling her to state the name of the CBS executive *to whom she thus specifically referred*, in no way interferes with her freedom to continue to do so. *Certainly, there was no interference with her publishing what she chose to publish in this instance.* There was no discrimination against a newspaper as in the case involving special taxes imposed on newspapers, relied on by petitioner.

If the petitioner is right in this case in asserting that compelling her to name the CBS executive is a violation of her rights under the First Amendment, *then every witness who is called to the stand may similarly refuse to state what he said off the stand on the ground that compelling him to do so would violate his right of freedom of speech under the First Amendment.* He would assert

that being compelled to testify would be a restraint upon his right to speak what he chooses to speak.

Suppose instead of having printed the statements of the CBS executive Torre had repeated them orally and attributed them to that executive, can it be doubted that she could be compelled on the witness stand to state his name?

Because as Mr. Justice Stewart stated (4a to 5a), freedom of the press "is not an absolute" and "the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom."

Mr. Justice Stewart further stated that "The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guaranty ~~that it is the duty of a witness to testify in a court of law~~ of a free press" (5a) and the "essentiality to the fabric of our society" (5a) of the correlative right to compel a witness to testify "is beyond controversy" (5a). Thus if "the freedom of the press is here involved * * * it, too, must give place under the Constitution to a paramount public interest in the fair administration of justice" (p. 6a).

CONCLUSION

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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